

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

5 In re application of: Mooney, et al. ) Group Art Unit: 3763  
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 Application No.: 09/329,002 ) Examiner: LoAn H. Thanh  
 )  
 Filing Date: June 8, 1999 )  
 10 For: MULTIPLE LUMEN ACCESS DEVICE )  
 )  
 Commissioner for Patents  
 Washington, D.C. 20231

#78  
 #2948  
 5/3/02

PETITION UNDER 37 CFR §1.182 TO RESET DATE OF AN OFFICE ACTION

Dear Sir:

20 This petition is being submitted concurrently with an Amendment responsive to a Final Office Action dated November 30, 2001. Applicants petition the Office to reset the date of said Office Action to the March 15, 2002, for the reason described below.

This Petition is submitted under Rule 182 because there is no specific regulation in 37 CFR pertaining to this situation. There are provisions in the MPEP directed to similar situations, but Applicants believe this instance warrants separate consideration, as will be explained below.

25 Attached is the original Office Action and envelope that were received on March 15, 2002 by the law department of a Baxter International branch in Irvine, California. Please see the attached email explaining the circumstances surrounding the receipt of the Office Action, from Diane Branham of Baxter Healthcare Corp. to Lena Vinitzskaya of Edwards Lifesciences, the assignee of the present invention. Guy Cumberbatch, the undersigned, spoke with Ms. Branham  
 30 after receiving and inspecting the Office Action on March 21, 2002, and Ms. Branham indicated that all of papers including the envelope were received in a plastic bag because of their deteriorating condition. It appears that the papers have been passed through an irradiating machine because they are extremely brittle. This is consistent with the increased security surrounding mail service in the Washington D.C. area.

35 More importantly, please note the post mark on the envelope which appears to indicate that it was sent in a month beginning with the letter "M" in the year 2002. Because of the date of receipt, Applicants believe that the letter was sent in March of 2002.

Based on experience, mail from the Patent Office takes approximately one week to arrive

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in California. Therefore, Applicants believe that the letter including the Office Action in question was sent in March of 2002. It was clearly not sent in 2001. If it was sent in March, then more than three months were lost between the *prima facie* date of mailing as printed on the Office Action, and the apparent date of mailing based on the evidence. This is greater even than  
5 the shortened statutory period for reply. Accordingly, because this time for response has been lost through no fault of the Applicants, the Office Action date should be reset to the date of receipt, March 15, 2002.

Edwards Lifesciences was previously a part of Baxter Healthcare, but was spun off in April of 2000. The two offices in Irvine are about a half-mile apart, and still maintain some ties,  
10 such as inter-office mail. When the present application was filed, it was in the name of Baxter International. Unfortunately, the company recipient for this application was never changed from a Baxter International, although the named recipient and street address remains correct. However, this minor confusion did not have anything to do with the letter being postmarked in March of 2002, or being received on March 15, 2002.

15 MPEP §710.06 speaks to situations when the reply period is restarted, and addresses situations when Office Actions are received late or postmarked later than the mailing date, both of which happened here. In these cases, the MPEP imposes a two-week reply date for petitions seeking to reset dates. Except for that reply time window, the facts above warrant resetting the date. The MPEP speaks to situations where the Office Action was received late but within the  
20 statutory period for response. Here, the Office Action was not mailed until after the statutory period for reply was passed. Applicants received the Office Action fully 3½ months after its official date of mailing.

Applicants Petition the Office to restart the Office Action date despite the policy of the MPEP because of the unjust situation that would result. The undersigned contacted the  
25 Examiner on March 21, 2002 and explained the situation. The Examiner did not know how to handle the situation and did not indicate that there was such a short period for reply with a petition. Indeed, in 11 years of practice the undersigned has never encountered such a short period for reply to anything in the Office. Both the Examiner and the undersigned presumed that

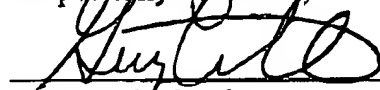
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the Petition, which in this case only affects the extension fee charged, would be filed with the substantive response as a request for a refund of the extension fee paid at the time. Refund requests must be submitted within two years of the date of paying the fee, and the undersigned had planned to submit such a request along with payment of the extension fee calculated from November 30, 2001. Unfortunately, the two week reply period in the MPEP was not discovered until it was too late. However, in this situation, Applicants believe that the Office should not follow such a rigid time schedule. The MPEP does not carry the force of law, and in some instances such as here should be used only to guide a just decision.

MPEP §710.06 reminds that there is no statutory requirement that a shortened statutory period as here be reset due to delay in the mail or in the Office. Nevertheless, the MPEP provides for a date reset but presumes that the delay is still within the statutory period. When as here the statutory period has passed, Applicants petition for relief from an unduly strict requirement. Whether submitted within two weeks or within two months as now, there is no advantage gained because the reset date would remain March 15, 2002. Further, this application does not gain the benefit of the new term extension laws and the term remains 20 years from the earliest priority date. The delay in the mails is simply lost. The only issue is whether the Office chooses to apply a time period for reply that is unique in the experience of the undersigned. Granted, the undersigned failed to discover in time that there was a relevant MPEP section, but as mentioned above the Examiner was contacted for guidance and none was provided.

Respectfully submitted,



Guy Cumberbatch  
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c/o Edwards Lifesciences LLC  
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Irvine, California 92614  
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I hereby certify that the above-identified document is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to the Commissioner of Patents, Washington D.C. on April 30, 2002.

Signed: 

Diane M Branham

03/15/02 08:34 AM

To: lena\_vinitzkaya@edwards.com, claudia\_previde@edwards.com

cc:

Subject: office action

we received in our PO box today and office action for one of your cases dated November 30, 2001. I am not going to try and fax it because it came in a partially shredded envelope and is in pretty bad shape. I was at the USPTO last month and their mailroom explained that a lot of the older mail had gone through irradiation at the post office and that even in the USPTO files a lot of it was in bad shape. I am assuming the reason this is so late is that it was caught up somewhere.

I don't know if your assistants are doing status checks or if they are still being docketed, but if so perhaps you have already gotten a copy of this from the USPTO. If not it's already almost 4 months old. Will send it in intercompany mail today but it will be Monday before you get it as we have only one pickup over here per day in late afternoon.

Diane Branham  
Baxter Healthcare Corporation  
Patent Administrator/Irvine  
949-250-6839

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